2006

Neldon Paul Johnson v. Ina Marie Johnson : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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NELDON PAUL JOHNSON, Appellant/Respondent, vs. INA MARIE JOHNSON, Appellee/Petitioner.	Court of Appeals No. 20060290 Civil No. 010500391

APPELLANT'S PETITION FOR REHEARING

Appeal from the Decision of the Utah Fourth District Court

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ARGUMENT

I. POINTS OF LAW AND FACTS OVERLOOKED BY UTAH COURT OF APPEALS

On July 12, 2007, the Utah Court of Appeals issued a memorandum decision affirming the trial court's decision. *See Johnson v. Johnson*, 2007 UT. App. 246, Case No. 20060290-CA (July 12, 2007)(Appendix 1). In the memorandum decision, the Utah Court of Appeals stated, "[t]he only final order associated with the stipulated property settlement that was entered within thirty days of Mr. Johnson's March 23, 2006 notice of appeal was the order entitled 'Order, In Re: January 23, 2006 Hearing.'" Appellant respectfully asks the Utah Court of Appeals to reconsider this position based upon the facts and points of law set forth below.

A. The Memorandum Decision Overlooks Two Orders Signed within Thirty Days of the Notice of Appeal

The memorandum decision issued by the court of appeals reviewed the order signed by the district court on February 27, 2006. However, on February 23, 2006, the district court entered two orders entitled "Ruling and Order: Re Respondent's Objection to Newly Prepared Trust Deed Note and Trust Deed" (R. 1731-1735) and on the same date, the district court entered "Ruling Re: Order to Show Cause." (R. 1737-1741). Using the court of appeals legal analysis regarding final orders, the memorandum decision should have addressed these two orders issued by the trial court on February 23, 2006. Those orders were issued twenty eight (28) days before the notice of appeal was filed on March 23, 2006. Therefore, the memorandum decision incorrectly addresses only the order issued on February

27, 2006 and ignores the orders issued by the district court on February 23, 2006. Because the two orders issued on February 23, 2006 were issued twenty eight days before the notice of appeal, the Utah Court of Appeals should address the issued briefed regarding those two orders.

Specifically, the two orders issued by the district court on February 23, 2006 pertain to the trust deed and trust deed note and the authority of the district court to issue contempt orders when the parties agreed to use a trust deed and trust deed note. The issues presented for review as set forth in Appellant's Opening Brief, which were within the thirty day time period, are as follows:

1. Did the lack of essential contract terms regarding the trust deed and trust deed note and the number of parcels to be transferred make the stipulated Amended Decree of Divorce ambiguous and/or unenforceable?

2. Did the modifications of the trust deed and trust deed note by the Court, without the consent of Mr. Johnson, make the stipulated Amended Decree of Divorce ambiguous and/or unenforceable?

3. Was the stipulated Amended Decree of Divorce ambiguous and/or unenforceable because the parties failed to have a meeting of the minds on the integral features of how many parcels were going to be deeded to Mrs. Johnson and the terms and conditions of the trust deed and trust deed note?

4. Was the stipulated Amended Decree of Divorce ambiguous and/or unenforceable because it lacked sufficient definiteness to be enforced?

5. Was the stipulated Amended Decree of Divorce ambiguous and/or unenforceable because it lacked sufficient definiteness to be enforced?

6. Is the use of contempt proceedings barred by the one-action rule in Utah Code Ann. § 78-37-1 where the parties agreed in the stipulated Amended Decree of Divorce that a trust deed and trust deed note would secure the property settlement?

7. Does the use of contempt proceedings violate article I, section 16 of the Utah Constitution where the contempt proceedings are used to enforce a property settlement secured by a trust deed and trust deed note, where the property settlement does not involve either alimony payments or child support payments?

8. Is the use of contempt proceedings prior to July 1, 2006 appropriate when the parties agreed in the stipulated Amended Decree of Divorce that a balloon payment on July 1, 2006 would be used to pay for any outstanding payments under the Amended Decree of Divorce?

9. Was it erroneous for Judge Howard to award a judgment to Mrs. Johnson in the amount of $223,982.97 for monthly payments under the stipulated Amended Decree of Divorce when two parcels of property had been inadvertently deeded to Mrs. Johnson, where the value of the property far

exceeded the amount owing and where the monthly payments had been secured by a trust deed and trust deed note and the parties had stipulated to a balloon payment in July 2006 for any past due payments.

On rehearing, the Utah Court of Appeals should address these issues as briefed by the parties and submitted to the court. The two orders filed by the district court on February 23, 2006 were clearly within the thirty day time period required by the rules.

B. The Memorandum Decision Encourages Piecemeal Appeals

The memorandum decision encourages parties to file piecemeal appeals in contradiction to existing Utah precedent. The memorandum decision addresses the order dated February 27, 2006 and ignores the several other pertinent orders entered by the district court, none of which disposed of the entire matter below. As stated above, even if the court chooses to treat all of the orders appealed as final orders, at a minimum the court should re-examine the two orders issued on February 23, 2006, as they were signed twenty eight days before the notice of appeal. However, the court should re-examine all of the orders appealed by Mr. Johnson because none of the orders constituted final orders until the last order of February 27, 2006 was signed by the district court.

For an order or judgment to be final, it must dispose of the subject-matter of the litigation on the merits of the case and end the controversy between the litigants. *Kennedy v. New Era Indus.*, 600 P.2d 534, 536 (Utah 1979). None of the orders entered before the February 27, 2006 order entered by the district court disposed of the proceeding or ended the controversy between the litigants. There still remained issued to be decided and pending

matters were before the court. Based upon the position set forth in the memorandum decision, Mr. Johnson would have been required to file a notice of appeal after each order was signed by the district court. This would require at least three notices of appeal and would fly in the face of many prior decisions issued by the Utah Supreme court not to file piecemeal appeals. *See Anderson v. Wilshire Investments, LLC*, 123 P.2d 393, 396 (Utah 2005)(the principal rationale for limiting the right to appeal in this way is to promote judicial economy by preventing piecemeal appeals in the same litigation to this Court); *Loffredo v. Holt*, 37 P.3d 1070, 1072 (Utah 2001)(final judgment rule prevents appellate courts from having to deal with piecemeal appeals in the same litigation); *Promax Development v. Raile*, 998 P.2d 254, 259 (Utah 2000)(amount of attorney's fees must be decided prior to appeal to enable an appellant to appeal all issues in a single notice of appeal).[1]

II. Conclusion

Mr. Johnson respectfully requests the court to reconsider the opinion set forth in the memorandum decision issued on July 12, 2007. The opinion overlooked the two orders issued on February 23, 2006 and also overlooked Utah precedent regarding piecemeal appeals. Therefore, the Utah Court of Appeals should reconsider all of the issues briefed by the parties. Counsel for Mr. Johnson hereby certifies that the petition for rehearing is submitted in good faith and not for delay as required by Rule 35 of the Utah Rules of Appellate Procedure.

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[1]In fact, Appellee's brief in opposition argues that none of the orders constitute final orders and is in direct contradiction of the position taken by the Utah Court of Appeals in the memorandum decision. Appellant responded to this argument in Appellant's Reply Brief.

DATED this 26 day of July, 2007.

NELSON, SNUFFER, DAHLE & POULSEN

Denver C. Snuffer, Jr.
Bret W. Reich

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **PETITION FOR REHEARING**, via first class mail, postage prepaid, on the following:

Rosemond G. Blakelock
75 South 300 West
Provo, Utah 84601
Attorneys for Appellee/Petitioner

on this 26 day of July, 2007.

Bret W. Reich

Appendix

1. *Johnson v. Johnson*, 2007 UT App 246 (July 12, 2007).

IN THE UTAH COURT OF APPEALS

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Ina Marie Johnson, Petitioner and Appellee, v. Neldon Paul Johnson, Respondent and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060290-CA F I L E D (July 12, 2007) 2007 UT App 246

Fourth District, Provo Department, 004401468
The Honorable Fred D. Howard

Attorneys: Denver C. Snuffer Jr., Sandy, for Appellant
Rosemond G. Blakelock, Provo, for Appellee

Before Judges Bench, McHugh, and Thorne.

BENCH, Presiding Judge:

Neldon Paul Johnson and Ina Marie Johnson were divorced on June 6, 2001, and the terms of their stipulated property settlement were included in an Amended Decree of Divorce entered on June 27, 2001. Mr. Johnson now attempts to appeal a variety of the trial court's decisions related to the stipulated property settlement.

The only final order associated with the stipulated property settlement that was entered within thirty days of Mr. Johnson's March 23, 2006 notice of appeal was the order entitled "Order, In Re: January 23, 2006 Hearing." Mr. Johnson did not specifically designate this order on his notice of appeal, but instead designated a document entitled "Order on Ruling Re: Respondent's Objection to Order Regarding the January 23, 2006 Hearing signed February 27, 2006." No such document bears that precise caption. Although not ideal, Mr. Johnson's description was sufficient to give notice of the order Mr. Johnson intended to appeal as it generally describes the order and it accurately bears the date of the order. See In re B.B., 2002 UT App 82,¶10, 45 P.3d 527 (holding that a notice of appeal designating only one of two orders intended to be appealed, while not "ideal," was sufficient to notify the opposing party "particularly where the orders bore the same date").

The Order In Re: January 23, 2006 Hearing presents three issues for appeal: (1) whether the trial court erred in using contempt proceedings in response to Mr. Johnson's failure to make payments required under the Amended Decree of Divorce; (2) whether the trial court erred in refusing to set off a judgment for past-due payments by the value of "additional" properties deeded to Ms. Johnson; and (3) whether the trial court clearly abused its discretion by awarding attorney fees to Ms. Johnson in a particular amount.

I. Failure to Make Payments

Mr. Johnson claims that the trial court erred by using contempt proceedings as the mechanism for ensuring his compliance in making payments required under the Amended Decree of Divorce, which payments were secured by a trust deed. Mr. Johnson argues that, in the event of his failure to pay, the "one-action rule" requires Ms. Johnson, the secured party under the trust deed, to foreclose on the trust deed prior to pursuing a judgment against him or subsequently pursuing contempt proceedings to prompt compliance with such judgment. "The issue is one of law, which this court reviews under a correction-of-error standard, without deference to the trial court's legal conclusions." Sanders v. Ovard, 838 P.2d 1134, 1135 (Utah 1992).

The one-action rule "prevent[s] a creditor from 'suing the debtor personally on [a trust deed] note until it first forecloses against the real property.'" Machock v. Fink, 2006 UT 30,¶12, 137 P.3d 779 (quoting City Consumer Servs. v. Peters, 815 P.2d 234, 236 (Utah 1991)). However, "'[w]here the security has been lost through no fault of the [creditor], an action may be maintained directly upon the personal obligation evidenced by the note without going through the idle and fruitless procedure of foreclosure.'" City Consumer Servs., 815 P.2d at 236 (quoting Cache Valley Banking Co. v. Logan Lodge No. 1453, 88 Utah 577, 56 P.2d 1046, 1049 (1936)). Where such is the case, "the one-action rule does not apply," id. at 237, and creditors "are . . . not limited in pursuing their full claim against [the debtor] personally," Sanders, 838 P.2d at 1136.

Given the trial court's finding that the property pledged as security under the trust deed had been "pillaged" by Mr. Johnson, it did not err in concluding that the one-action rule did not apply and that Ms. Johnson was free to pursue a judgment against Mr. Johnson personally for past-due payments. Furthermore, when Mr. Johnson refused to comply with the judgment for past-due payments, it was well within the trial court's discretion to use contempt proceedings as a means of effectuating compliance with its judgment and orders. See Utah Code Ann. § 78-32-1(5) (2002) ("Disobedience of any lawful judgment, order or process of the

court . . . [is] contempt[] of the authority of the court . . . ."); Shipman v. Evans, 2004 UT 44,¶39, 100 P.3d 1151 (noting that "a trial court's exercise of its contempt power" is reviewed under an abuse-of-discretion standard).

II. Set-off for "Additional" Properties

Mr. Johnson claims that the trial court erred in denying him a set-off against the judgment for late payments in the amount representing the value of two "additional" parcels he "inadvertently" deeded to Ms. Johnson. In reviewing the record, it is evident that the trial court denied Mr. Johnson's request for a set-off based on a factual finding that Mr. Johnson had not given Ms. Johnson any additional property, but instead, had given her exactly what the Amended Decree of Divorce had ordered him to give.

On appeal, Mr. Johnson fails to marshal the evidence supporting the trial court's factual finding, see Utah R. App. P. 24(a)(9), and likewise fails to "ferret out a fatal flaw in the evidence." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah 1991). In light of this failure, "'we assume[] that the record supports the finding[]' . . . and conclude the finding was not clearly erroneous." Harris v. IES Assocs., 2003 UT App 112,¶32, 69 P.3d 297 (alterations in original) (quoting Heber City Corp. v. Simpson, 942 P.2d 307, 312 (Utah 1997)).

III. Attorney Fees for January 2006 Hearing

Mr. Johnson contends that the award of attorney fees for the January 23, 2006 hearing was unreasonable, asserting that the award was excessive in amount and included fees for work unrelated to that specific hearing. "[A] trial court has 'broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard.'" Jensen v. Sawyers, 2005 UT 81,¶127, 130 P.3d 325 (quoting Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988)). Thus, "'[t]he standard of review on appeal of [the amount of] a trial court's award of attorney fees is patent error or clear abuse of discretion.'" Id. (second alteration in original) (quoting Valcarce v. Fitzgerald, 961 P.2d 305, 316 (Utah 1998)).

We conclude that the trial court did not commit patent error or clearly abuse its discretion in determining the amount of the award for attorney fees associated with the January 23, 2006 hearing. Mr. Johnson provides no specific explanation as to why the court clearly erred in finding fees incurred in prior years related to the January 2006 hearing. The post-decree enforcement issues resolved in the January 2006 hearing appear to have been

continuously litigated over the course of several years. It was therefore not unreasonable for the trial court to determine that fees listed in Ms. Johnson's counsel's affidavit, even those from prior years, were necessary to prepare for the January 2006 hearing.

We therefore affirm the trial court's decisions regarding the hearing on January 23, 2006. Because Ms. Johnson was awarded attorney fees below, and because she has prevailed on appeal, she is entitled to recover her fees on appeal. See Utah Code Ann. § 30-3-3(2) (Supp. 2006) ("In any action to enforce an order of . . . division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense."); Lyngle v. Lyngle, 831 P.2d 1027, 1031 (Utah Ct. App. 1992) ("Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal."); Maughan v. Maughan, 770 P.2d 156, 162 (Utah Ct. App. 1989) (acknowledging that Utah Code section 30-3-3 creates a statutory basis for awarding attorney fees to a prevailing party in a domestic case on appeal). Accordingly, we remand for a determination of those attorney fees that Ms. Johnson reasonably incurred on appeal.

Russell W. Bench,
Presiding Judge

WE CONCUR:

Carolyn B. McHugh, Judge

William A. Thorne, Judge